

SERVED: November 5, 1992

NTSB Order No. EM-167

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 26th day of October, 1992

_____)	
J. W. KIME,)	
Commandant,)	
United States Coast Guard,)	
)	
)	
v.)	Docket ME-153
)	
)	
RICHARD L. SMALLWOOD,)	
)	
Appellant.)	
_____)	

ORDER DISMISSING APPEAL

The appellant, by counsel, has filed a motion, not opposed by the Coast Guard, requesting that the Board accept a late notice of appeal he has taken from a decision of the Commandant affirming the revocation of his merchant mariner's document on a charge of use of a dangerous drug. We will deny the motion and dismiss the untimely appeal.

Counsel for appellant asserts that he received what appeared to be a copy of the Commandant's decision in his case on May 20, 1992, but was advised on that date by the Coast Guard that he had mistakenly been sent the original of the decision. He returned the original pursuant to the Coast Guard's request and waited for a copy of the original to be sent to him.¹

¹The Coast Guard suggests, in its letter indicating no opposition to the appellant's motion, that he "may have reasonably believed that a new Decision was forthcoming, rather than acting on his copy of the original that had been mistakenly mailed." There is, however, no suggestion in appellant's motion

Although a copy was apparently received several days later, no notice of appeal was filed until June 4, some 5 days after the 10 day deadline for appealing to the Board from a decision of the Commandant had expired.² See 49 CFR Section 825.5.³

While it may be that the initial confusion over the status of the decision appellant's counsel received may have caused a delay in the preparation and filing of a notice of appeal, it does not appear that appellant's counsel's failure to file a timely notice is attributable to that circumstance. Rather, it appears that the notice was filed late because, as counsel for the appellant forthrightly admits, it was mistakenly believed that the time limit for filing the notice was 30 days, not 10 days.⁴

In view of the foregoing, the Board cannot find that good cause exists to excuse appellant's late notice of appeal, or, stated differently, to justify accepting it out of time. There is no showing that appellant could not have filed a timely notice of appeal despite the fact that his time to do so had been diminished by several days by the mismailing, and we do not believe that the fact that the Commandant's decision did not contain information on appellant's appeal rights relieved his attorneys of the obligation to find out what they might be and the timeframes that should be observed to preserve them.
(..continued)

or other filings that there was any belief that the copy to be received in exchange for the original would be in any way different from the original.

²The date on which the copy of the decision was received is not specified in the appellant's motion. Appellant makes no claim that the notice of appeal was filed within 10 days after service of either mailing he received from the Commandant.

³Section 825.5 provides, in relevant part, as follows:

"§825.5 Notice of appeal.

(a) A party may appeal from the Commandant's decision...by filing a notice of appeal with the Board within 10 days after service of the Commandant's decision upon the party or his designated attorney. Upon good cause shown, the time for filing may be extended."

⁴In a Supplemental Motion to Accept Late Filing of Notice of Appeal, counsel for appellant suggest that their mistaken belief that they had 30 days in which to file the notice resulted from the Commandant's failure in his decision to include information concerning appellant's appeal rights and any applicable time limits.

Dismissal of the appeal for want of good cause to excuse appellant's procedural default is therefore dictated by Board precedent. See, e.g., Commandant v. Grace, NTSB Order No. EM-162 (1991), reconsideration denied, NTSB Order No. EM-163 (1991), aff'd Grace v. NTSB, No. 91-5096 (5th Cir. June 17, 1992).

ACCORDINGLY, IT IS ORDERED THAT:

1. Appellant's motions for an extension of time to accept a late-filed notice of appeal are denied, and

2. Appellant's appeal from Commandant Decision No. 2538 is dismissed.

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above order.